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NO. 98596-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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IN RE DEPENDENCY of E.M.,  
a minor child.

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**AMICUS BRIEF OF THE OFFICE OF CIVIL LEGAL AID**

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## **I. INTRODUCTION AND INTEREST OF AMICUS**

The Legislature enacted RCW 13.34.100 to provide for representation of children in dependency and termination cases. The Court of Appeals concluded in this case that RCW 13.34.100 instead operates as an impediment to the representation of a minor by counsel. This Court should grant review to determine whether privately-retained counsel may appear on behalf of a minor child without being first appointed by the court pursuant to RCW 13.34.100(7). This presents an “issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4).

Amicus, Office of Civil Legal Aid (OCLA), is an independent agency of the judicial branch. RCW 2.53.020(1). The Legislature formed OCLA in order to fund civil legal aid services to indigent persons, as a component of effectively administering justice. RCW 2.53.005. OCLA contracts with legal aid providers to provide those services as authorized by law. RCW 2.53.020(3). State funds appropriated for civil legal aid, including for the representation of indigent children in family law matters, are distributed through OCLA. RCW 2.53.030(2); RCW 2.53.045(1); RCW 13.34.100(6)(c)(iii). OCLA therefore has an interest in this case to the extent that the appointment of counsel under RCW 13.34.100(7) is at issue; OCLA expresses no views on the underlying merits of the case regarding the specific dependency proceeding in which this issue arises.

This petition for review arises out of the appearance of a private attorney for the minor child, E.M. *In re Dependency of E.M.*, 12 Wn. App. 2d 510, 514, 458 P.3d 810 (2020). No question is presented regarding the appointment of counsel to appear at public expense; the sole question is whether a statute that provides a procedure for the discretionary appointment of counsel at public expense precluded a privately-retained attorney from appearing to represent E.M. The Court of Appeals incorrectly held that it did. *Id.* at 520. This Court should grant review and reverse because RCW 13.34.100(7), properly construed, does not impede the private retention of counsel for a minor child in a dependency.

## **II. ISSUE ADDRESSED BY AMICUS**

Does RCW 13.34.100(7) preclude a private individual from hiring counsel to represent a minor in a dependency action without a motion requesting appointment of counsel at public expense?

## **III. STATEMENT OF THE CASE**

OCLA accepts and relies upon the statements of the case presented by both Petitioner and Respondent in this matter.

#### IV. ARGUMENT

##### A. **The Court of Appeals' Conclusion That RCW 13.34.100(7) *Impedes*, Rather Than *Supplements*, the Retention of Counsel at Private Expense Presents a Question of Substantial Public Interest Requiring Resolution by This Court**

###### 1. **This Matter is Not Moot**

The Department of Children, Youth, and Families (DCYF), Respondent in this matter, contends that this Court should deny review because the case is moot. DCYF points out that the attorney retained to appear on behalf of E.M. has since become a judge of the Superior Court, and therefore may not appear as counsel. DCYF Answer in Opposition to Petition for Review (DCYF Answer) at 10-11. But a case becomes moot only when the Court is no longer capable of granting effective relief. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2018). This Court can still grant effective relief. Although the specific attorney retained below to represent E.M. is no longer available, the dependency action itself remains pending. A different attorney, perhaps even from the same firm, therefore may still be retained on behalf of E.M. after this Court authoritatively construes RCW 13.34.100(7).

This Court may, in addition, “retain and decide an appeal if it involves matters of continuing and substantial public interest.” *Id.* As discussed more fully below, the Court of Appeals concluded that a

privately-retained attorney may not appear on behalf of a minor child unless that attorney has first been appointed by the juvenile court under a system designed to provide counsel at public expense for an indigent child. *In re Dependency of E.M.*, 12 Wn. App. 2d at 520.

The decision below is published, and therefore can be expected to deter the retention of private counsel by private parties in other dependency actions. The decision of the Court of Appeals improperly bars private parties from retaining counsel at private expense on behalf of minors. This case therefore presents a question of substantial public interest that simultaneously both justifies this Court's consideration even if the matter was moot and provides a basis for this Court's discretionary review.

**2. RCW 13.34.100(7) Does Not Limit the Right of Private Parties to Engage Counsel at Private Expense**

The Legislature enacted RCW 13.34.100(7) in order to provide a mechanism for the discretionary appointment of counsel at public expense for a minor in a dependency action. *See In re Dependency of E.H.*, 191 Wn.2d 872, 878, 427 P.3d 587 (2018). The Court of Appeals erred by concluding that RCW 13.34.100(7) imposed a new requirement on privately retained counsel where no request for appointment of counsel at public expense is at issue. The representation of a child by counsel is an important matter, whether or not representation at public expense is constitutionally

compelled. *In re Dependency of M.S.R.*, 174 Wn.2d 1, 21, 271 P.3d 274 (2012). This is true even where a guardian ad litem or court-appointed special advocate is also present. *Id.* This Court should therefore grant review to properly construe RCW 13.34.100(7) as an “issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4).

The statute reads, in pertinent part:

(7)(a) The court may appoint an attorney to represent the child’s position in any dependency action on its own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department.

(b)(i) If the court has not already appointed an attorney for a child, *or the child is not represented by a privately retained attorney*:

(A) The child’s caregiver, or any individual, may refer the child to an attorney for the purposes of filing a motion to request appointment of an attorney at public expense; or

(B) The child or any individual may retain an attorney for the child for the purposes of filing a motion to request appointment of an attorney at public expense.

(ii) Nothing in this subsection (7)(b) shall be construed to change or alter the confidentiality provisions of RCW 13.50.100.

RCW 13.34.100(7)(a) & (b) (emphasis added).

The Legislature added the quoted language to RCW 13.34.100 in 2014. Laws of 2014, ch. 108, § 2. No other statute restricts the ability of a private party to retain private counsel at private expense on behalf of a

minor child. It therefore follows that before 2014, a private entity could engage counsel in a dependency action as occurred here.

Nothing in the 2014 amendment to RCW 13.34.100(7) changed that status quo. The text of the statute merely added a provision for the discretionary appointment of counsel. RCW 13.34.100(7)(a) (“The court may appoint an attorney . . .”). This provision for appointed counsel expressly recognized the possibility that counsel might already be privately retained before the juvenile court considers appointment. RCW 13.34.100(7)(b)(1).

The 2014 amendment addressed the appointment of counsel at public expense, not the private retention of private counsel. RCW 13.34.100(7)(a), by its express terms and in context, addresses only the discretionary appointment of counsel for a child in a dependency action. The need for such a provision arises only if the child does not have privately retained counsel. This is the change wrought by the 2014 amendment: a new provision for the discretionary appointment of counsel at public expense. Laws of 2014, ch. 108, § 2.

To reach a contrary conclusion, the Court of Appeals looked to the statute’s mention of appointment of counsel either on the court’s own motion or by request of an interested party. *In re Dependency of E.M.*, 12 Wn. App. 2d at 519. But the import of the text added to RCW 13.34.100(7)

in 2014 was to facilitate the discretionary appointment of counsel at public expense. The Court of Appeals' interpretation stands in direct juxtaposition with the express statutory acknowledgment that the procedure for appointing counsel applies only if private counsel has not already been retained. RCW 13.34.100(7)(b)(1). The text of the statute nowhere suggests the reading adopted by the Court of Appeals that the statute imposed a new and blanket requirement for the appointment of *any* counsel, whether at public or private expense.

The Court of Appeals erred in concluding that the addition of a new process for the discretionary appointment of counsel was intended to give the court a “gatekeeping” role as to all attorneys, whether privately retained or publicly provided. *Id.* at 519. The Legislature certainly envisioned such a role when counsel is appointed at public expense. But the intent to prohibit privately-retained counsel—something that is universally allowed in civil litigation—would be quite another matter entirely. One would expect that a statute banning the private retention of counsel would say so directly; the Legislature would not leave the matter to be inferred from the addition of a provision creating a new process for discretionary appointment of counsel at public expense. RCW 13.34.100(7)(a). And one would even less anticipate that such a result would be inferred from language that explicitly acknowledges that private counsel may have already been retained before

that new discretionary procedure is invoked. RCW 13.34.100(7)(b). The Court of Appeals' analysis improperly adds a restriction on the retention of private counsel to a statute that doesn't contain one. *See, Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) ("a court must not add words where the Legislature has chosen not to").

The obvious policy purpose in adding RCW 13.34.100(7)(a) and (b) to the statute was to provide a mechanism for the appointment of counsel at public expense. No new provision was needed in order to accommodate privately-retained counsel, since interested parties had the ability to retain counsel at their own expense before 2014. The construction of RCW 13.34.100(7) announced by the Court of Appeals transformed the effect of the 2014 legislation from an act that *expanded* authority to provide counsel at public expense into an act designed to *restrict* the private retention of private counsel at private expense. Neither the language nor the purpose of the 2014 act support that transformation of its effect.

**B. Amicus OCLA Expresses No Views Regarding the Merits of the Underlying Dependency Action**

OCLA's participation as Amicus Curiae is limited to the question of whether RCW 13.34.100(7) prohibits the private retention of counsel on

behalf of a minor child in a dependent action. OCLA offers no views as to the merits of any other issues.

**V. CONCLUSION**

For these reasons, this Court should grant the petition for review based upon RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 22nd day of July 2020.

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